



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 385/16

**BEFORE:** T. Mitchinson: Vice-Chair

**HEARING:** February 11, 2016 at Toronto  
Oral

**DATE OF DECISION:** February 16, 2016

**NEUTRAL CITATION:** 2016 ONWSIAT 395

### APPLICATION FOR ORDER REMOVING THE RIGHT TO SUE

#### APPEARANCES:

**For the Applicant:** S. Vassalli, Lawyer

**For the co-applicants:** D. Malone, Lawyer  
C. Moore, Lawyer

**For the Respondent:** T. Zwiebel, Lawyer

**Interpreter:** N/A

## REASONS

### (i) Introduction

[1] This is an application under section 31 of the *Workplace Safety and Insurance Act* by two defendants in an action filed in the Ontario Superior Court of Justice as Court File No. 6991/11, for a declaration and order to bar the plaintiff/respondent from commencing and maintaining a civil action against the defendants for damages stemming from an accident that occurred on February 23, 2011.

[2] The application was heard in Toronto on February 11, 2016.

[3] The applicants, Joe C. Manguito (Manguito) and Joao Manguito, are represented by Sabatina Vassalli, a lawyer.

[4] One of the co-applicants, Certas Direct Insurance Company (Certas), is represented by Danielle Malone, a lawyer. This company is the statutory accident benefits carrier for any insurance claim by the respondent stemming from the February 23, 2011 accident.

[5] The other co-applicants are 690346 Ontario Inc., and 1893150 Ontario Inc., operating as Magna Structural Systems Inc., and carrying on business as Modatek Systems (Modatek). 690346 Ontario Inc. is a third defendant in the civil action and is also seeking to bar the plaintiff/respondent from commencing and maintaining the action by virtue of section 31 of the Act. These entities are all represented by Christopher Moore, also a lawyer.

[6] The respondent, Iqbal Singh Sandhu (Sandhu), is represented by lawyer Thomas Zwiebel.

[7] All representatives were in attendance at the February 11, 2016 hearing.

### (ii) Applicable law

[8] The accident leading to the civil law suit and this section 31 application occurred in 2011. Therefore, the *Workplace Safety and Insurance Act* (the Act) applies.

### (iii) Statutory provisions and Board policy

[9] Sections 28(1) and 31(1) of the Act reads as follows:

28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

...

31(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the Insurance Act may apply to the Appeals Tribunal to determine,

- (a) whether, because of this Act, the right to commence an action is taken away;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or

(c) whether the plaintiff is entitled to claim benefits under the insurance plan.

[10] Board *Operational Policy Manual* (OPM) Document No. 15-01-05 sets out the policy and guidelines for determining whether the requirements of section 31(1) of the Act are present:

**POLICY**

The Act provides no fault loss of earnings benefits for injuries arising out of and in the course of employment in lieu of all rights of action that a worker or survivor may have against the worker's employer. In most cases any right of action is taken away by the Act. However, there are circumstances where a worker or survivor may have a right of action against a third party.

**GUIDELINES**

When all parties involved in the accident were in the course of their employment, the worker has no right of action against any Schedule 1

- employer
- director
- executive officer, or
- worker

[11] Section 2(1) of the Act defines worker as "a person who has entered into or is employed under a contract of service ...".

**(iv) Facts**

[12] Prior to the hearing, the parties submitted an Agreed Statement of Facts.

[13] The Tribunal Practice Direction on Right to Sue Applications includes the following provisions:

**7.4 Withdrawals and Orders on Consent**

...

- (b) If the parties have settled the action but continue to seek a determination from the Tribunal with respect to issues raised in the application, they must attend on the scheduled hearing date with an agreed statement of facts, which is supported by available documentation.
- (c) The Tribunal is not bound by the agreed statement of facts of parties to an application. Therefore, parties in the situation described in paragraph 7.4(b), are required to be prepared to speak to the matter on the scheduled hearing date and respond to any questions or concerns raised by a Tribunal Panel or Vice-Chair.

[14] I have reviewed the Case Record, including the Applicants' Statement and the two Co-applicants' Statements and am essentially in agreement with the facts set out in the Agreed Statement of Facts. The pertinent facts are as follows:

- Sandhu and Manguito were both employees of Modatek on February 22, 2011.
- Modatek is a subdivision of Magna International Company engaged in the automotive manufacturing and supply business.
- Sandhu and Manguito had both finished their work shift on February 22, 2011 and were in the parking lot adjacent to the worksite when an accident occurred.

- The parking lot is owned by 690346 Ontario Inc. Modatek leased the parking lot from 690346 Ontario Inc. Under the terms of the lease, Modatek was responsible for the maintenance of the parking lot.
- The parking lot is made available by Modatek for its employees to park their personal vehicles while at work.
- Sandhu was walking through the parking lot to reach his vehicle when he was struck by a vehicle driven by Manguito, who was attempting to exit the parking lot.
- Joao Manguito was the owner of the vehicle being driven by Manguito.
- On April 30, 2012, Sandhu commenced an action in the Superior Court of Justice (Court File No. 6991/11) naming Manguito, Joao Manguito and 690346 Ontario Inc. as defendants. He claimed that the defendants were liable in negligence for injuries he suffered as a result of the accident.
- On June 5, 2013, Manguito and Joao Manguito issued a Third Party Claim against Modatek, seeking contribution and indemnity for any sums that the Manguitos may be found liable to pay Sandhu in the main action.
- Sandhu applied to Certas and received statutory accident benefits pursuant to the *Statutory Accident Benefits Schedule*.

**(v) Findings**

[15] The parties consent to my findings as follows:

- To the extent that 690346 Ontario Inc. had a role in operating the parking lot, it was a Schedule 1 employer under the Act.
- Modatek was a Schedule 1 employer under the Act.
- Sandhu and Manguito were both Schedule 1 employees of Modatek under the Act at the time of the accident.
- Sandhu and Manguito were both engaged in work-related activities at the time of the accident, namely leaving the work premises, which is an activity that is reasonably incidental to employment. As such, the accident arose out of and in the course of the employment of both Sandhu and Manguito.
- Pursuant to section 31 of the Act, Sandhu is barred from commencing and maintaining the civil action in the Ontario Superior Court of Justice (Court File No. 6991/11) for damages stemming from the February 23, 2011 accident.
- While Sandhu has not brought an action against Modatek, he is barred from doing so by virtue of section 31 of the Act.
- Certas is entitled to seek payment for benefits paid to Sandhu from the Workplace Safety and Insurance Board.

**DISPOSITION**

[16] The application is allowed.

[17] Sandhu is barred from commencing and maintaining a civil action against Manguito, Joao Manguito, 690346 Ontario Inc. and Modatek for damages stemming from a February 23, 2011 motor vehicle accident.

[18] Sandhu was a Schedule 1 employee working for a Schedule 1 employer at the time of the February 23, 2011 accident, and is entitled to file a claim with the Workplace Safety and Insurance Board under the Act.

DATED: February 16, 2016

SIGNED: T. Mitchinson